

In re ) Fair Hearing No. 10,697  
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Appeal of )

The petitioner seeks an expungement of an unsubstantiated report of adult abuse concerning her entered in the registry by the Department of Social and Rehabilitation Services. The Department moves to dismiss her appeal for lack of jurisdiction.

The parties have agreed that the facts, as set forth in their attached memoranda, shall constitute the facts for purpose of the Motion to Dismiss. For purposes of this Motion only, those facts can be fairly summarized as follows:

1. On June 27, 1991, the Adult Protective Services Division (APS) of SRS received a report of suspected abuse of an elderly man by the petitioner. APS accepted the report and commenced an investigation.

2. Following the investigation of this matter, APS determined that the report was unsubstantiated and so officially notified the petitioner on August 6, 1991.

3. The Department pursuant to 33 V.S.A. § 6911(a), entered the unsubstantiated report into the registry for a twelve month period.

4. On August 2, 1991, the petitioner appealed to the Human Services Board seeking to have the unsubstantiated report expunged from the registry. She does not claim and the facts do not show that the twelve month period has run.

ORDER

The Department's Motion to Dismiss is granted.

REASONS

The general statute governing appeals to the Human Services Board provides as follows:

An applicant for or a recipient of assistance, benefits or social services from the department of social and rehabilitation services, the department of social welfare, the office of child development, the office of economic opportunity, the office on aging, or an applicant for a license from one of those departments or offices, or a licensee, may file a request for a fair hearing with the human services board. An opportunity for a fair hearing will be granted to any individual requesting a hearing because his claim for assistance, benefits or services is denied, or is not acted upon with reasonable promptness; or because he is aggrieved by any other agency action affecting his receipt of assistance, benefits or services, or his license or license application; or because he is aggrieved by agency policy as it affects his situation.

3 V.S.A § 3091(a).

Although the petitioner admits that she is neither an applicant for or recipient of assistance, benefits or social services from SRS, or a licensee or an applicant for a license, she nevertheless asserts that the statutory language confers a right to appeal on her by virtue of the broad language in the second sentence allegedly granting an opportunity for a fair hearing to any individual "aggrieved by agency policy as it affects his situation". The

petitioner argues that this language is so broad that even a "zookeeper" could bring an appeal before the Board if she had a grievance of any kind against the Department.

Although this particular ground for appeal is one of first impression, the Board has had occasion in the past to interpret the second sentence of 3 V.S.A. § 3091(a) and has not found it to confer so broad a basis for jurisdiction as the petitioner now urges. The Board has previously held that the term "individual" in the second sentence "refers back to those claimants enumerated in the first sentence of the paragraph and is not a general grant of jurisdiction". Fair Hearings No. 260, 9455. The second sentence refers only to the types of claims which may be brought by those persons enumerated in the first sentence. As the petitioner asserts, that language is very broad but serves only to expand the types of claims which may be brought, not the types of claimants. As the petitioner does not allege that she is among the list of enumerated claimants in sentence one, it must be concluded that the Board does not have jurisdiction to hear her claim under 3 V.S.A. § 3091(a).

Jurisdiction to hear from other types of claimants is, however, specifically conferred on the Board in certain cases by other statutes. One of those is the statute which protects elderly and disabled adults from abuse, neglect and exploitation at 33 V.S.A. § 6901, et. seq. The section regarding appeals states as follows:

(a) The commissioner shall maintain a registry which shall contain written records of all investigations initiated under section 6908 of this title unless the commissioner or designee determines after investigation that the reported facts are unsubstantiated, in which case the report shall be destroyed after the report has been maintained in the registry for 12 months unless another report concerning the same parties or facility has been filed.

(b) The commissioner shall adopt regulations to permit use of the registry while preserving confidentiality of the records.

(c) Written records maintained in the registry shall only be disclosed to the commissioner or person designated to receive such records, persons assigned by the commissioner to investigate reports, the person report to have abused, neglected or exploited an elderly or disabled adult, the elderly person or disabled adult or his or her representative, a state's attorney or the attorney general. In no event shall records be made available for employment purposes, for credit purposes, or to a law enforcement agency other than the state's attorney or the attorney general. Oral communications concerning a report shall only be made to persons entitled to disclosure of written reports. Any person who violates this subsection shall be fined not more than \$500.00. A person may, at any time, apply to the human services board for relief if he or she has reasonable cause to believe that contents of the registry are being misused. Registry records relating to an elderly or disabled adult shall not be destroyed sooner than 90 days from the date the elderly or disabled adult has deceased. All registry records shall be maintained according to the name of the person who has been substantiated to have abused, neglected or exploited an elderly or disabled adult.

(d) A person may, at any time, apply to the human services board for an order expunging from the registry a record concerning him or her on the grounds that it is unsubstantiated or not otherwise expunged in accordance with this section. The board shall hold a fair hearing under section 3091 of Title 3 of the application at which hearing the burden shall be on the commissioner to establish that the record shall not be expunged.

33 V.S.A. § 6911

From the plain language of the above statute, it must be concluded that the Board has the jurisdiction to hear

only appeals (1) from any person seeking to expunge his or her name from the registry because a report of abuse was substantiated and should not have been or, the report was unsubstantiated but has been kept in the registry for more than twelve months, and (2) from any person who has reasonable cause to believe that the contents of the registry are being misused.

The petitioner's claim falls into neither of these categories. Rather, the petitioner asks to expunge her name from the registry because she alleges the Department erroneously initiated an investigation. There is nothing in the statute which contemplates the Board reviewing the Department's decision to initially investigate the report. The initiation of an investigation appears to be required by statute after a report is received, see 33 V.S.A. § 6906(a), and, to the extent that SRS may have any discretion to proceed to investigate, the Board has certainly not been given any authority to review that particular action. By statute, once the report is investigated, it must be placed in the registry and remain there to show that fact for twelve months, even if it is unsubstantiated. 33 V.S.A. § 3911(a). There is no language in the regulations which would allow the Board to expunge any unsubstantiated report from the registry during the first twelve months after it is placed there, let alone one based on an allegedly "erroneously" commenced investigation.

As the subject matter of the petitioner's appeal has

not been statutorily placed under the jurisdiction of the Board and as there is no relief which the Board can give the petitioner, the Department's Motion to Dismiss this matter is granted.

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